UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MOHAWK INDUSTRIES, INC.

Employer

10–RD–209088

and

WORKERS UNITED, SOUTHERN REGION, AN AFFILIATE OF SEIU, AND ITS LOCAL 294-T

Union

And

TIA LEMON

Petitioner

_____/

UNION'S OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DISMISSAL OF PETITION

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INTRODUCTION

Workers United, Southern Region and its Local 294-T ("Southern Region"), and their various predecessor labor organizations, have been the bargaining representative of employees of Mohawk Industries, Inc. ("Mohawk") for 79 years. Petitioner Tia Lemon filed a decertification petition (the "RD petition") supported by a showing of interest that is tainted by Mohawk's wide-spread support of the decertification effort, which includes numerous instances of Mohawk supervisors soliciting employees to sign the RD petition. Region 10 conducted a thorough investigation, and the Regional Director (the "Director") found that Mohawk unlawfully supported the decertification effort and that Mohawk's unlawful support tainted the RD petition. The Director therefore dismissed the petition. Petitioner now challenges the Director's dismissal. Notably, Petitioner does not argue that Mohawk's unlawful support does not require dismissal of the RD petition under the Board's blocking charge policy and established Board law. Instead, Petitioner argues that the blocking charge policy should be overturned. However, the policy can only be changed through rule making, not on an ad-hoc basis as Petitioner has requested. Moreover, the policy is consistent with, and, in important respects mandated by, the Act's §9(c). Therefore, Southern Region respectfully requests that the Board follow its long-established blocking charge policy and affirm the Director's dismissal of the RD petition pending litigation of the Director's complaint against Mohawk for illegal support of the decertification campaign.

BACKGROUND

Relevant procedural history

Southern Region and its predecessor unions have represented a unit of Mohawk's employees since 1939. On November 1, 2017, Lemon filed the decertification petition, which was docketed as Case No. 10-RD-209088. Upon investigating the matter, Southern Region discovered numerous instances of Mohawk supervisors' direct involvement in obtaining signatures to support the RD petition. On November 7, Southern Region filed its first in a series of charges and amendments.[1] Also on November 7, it filed a request to block the petition, accompanied by an offer of proof. The Director granted the request on November 8, and renewed this grant on December 13. After investigating the matter, the Director issued a complaint on April 30, 2018 and amendments on May 7, 2018, alleging numerous §8(a)(1) violations.

On May 2, 2018, the Director dismissed the petition, "subject to reinstatement, if appropriate, after final disposition of the charges…." He found "evidence that the Employer assisted the decertification process" in numerous respects and that Mohawk's involvement "tainted the petition." Specifically, the Director found evidence that Mohawk assisted the decertification process by:

- soliciting employees to sign the decertification petition,
- instructing employees to solicit other employees to sign the petition,
- interrogating employees with respect to the petition,
- promising employees benefits if they signed the petition or decertified the Union,

[1] These were numbered 10-CA-209405 and 10-CA-212989.

- threatening employees with unspecified reprisals if they did not sign the decertification petition,
- creating the impression among its employees that the Employer was monitoring who had signed the decertification petition,
- allowing employees to be outside their designated work areas for the purpose of soliciting employees to sign the petition,
- transferring the Petitioner to a shift other than her own for the purpose of soliciting employees to sign the petition.

Petitioner Lemon is requesting review of this dismissal order. Her brief challenges generally the Board's blocking charge policy.

The blocking charge policy

The blocking charge policy ("the Policy"), is set forth in the Board's Rules and Regulations, §103.20 and in the NLRB Casehandling Manual (Part Two) Representation Proceedings ("CHM"), §§11730-11731. §103.20 provides that the regional director may block the processing of a petition upon a request to block and an offer of proof. CHM §11730.3(a) identifies as an example of a charge subject to this procedure "an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the support of a RD … petition…." CHM §11733.2(a)(1), entitled "Violations that Affect the Petition or Showing of Interest," provides that the Regional Director should dismiss the petition if the §8(a)(1) charge is meritorious "and the alleged conduct, if proven, directly affects a petition or its showing of interest to an extent that the showing is insufficient…." The dismissed charge will be "subject to a request for reinstatement by the petitioner after final disposition of the C case." See also CHM §11733.2(b), providing guidance as to the dismissal letter's contents.

ARGUMENT

I. Introduction to the argument

Petitioner challenges the very existence of a blocking charge policy. Lemon wants the Board to eliminate the Policy and to replace it with a new policy of vote now, open the ballots now, litigate later any charges of unlawful employer support. However, because the Policy is codified in the Board's Rules and Regulations, §103.20, to eliminate the Policy, the Board must invoke APA rulemaking. Moreover, there is ample evidence of Mohawk's unlawful support of the decertification effort. Under the blocking charge policy and established Board case law, the RD petition is tainted and must be dismissed.

Even though a request for review is not the appropriate forum to change the Board's blocking charge policy, Southern Region explains why the policy should be maintained. The Policy is set forth in the CHM. The CHM's purpose is to provide guidance for the Board's regional personnel.[2] The CHM provisions regarding the Policy provide guidance for the effectuation of §9(c)(1)(A) requirements (1) that decertification petitions be filed with significant employee support, where "significant" implies support untainted by employer interference, restraint and/or coercion; and (2) that employers not indirectly file decertification petitions by unlawfully supporting a nominal employee petitioner. Determining whether a petition complies with these §9(c)(1)(A) requirements is a prerequisite to processing the petition – if there is non-compliance, there is no hearing and no election.

[2] E.g., CHM (Part Two) Representation Proceedings, introductory section entitled "Purpose of the Manual."

Moreover, processing non-compliant petitions would allow employers to scam the Board's §9 election processes and would waste the Board's resources on elections that would likely be declared invalid.

And a vote conducted before the Board determines whether the employer unlawfully supported the petition would undermine pro-union employees' §7 rights to union representation. The conduct of a tainted election is itself coercive. Meanwhile, vote now – litigate later would provide anti-union employees with an uncertain election outcome and no real benefit – the employer must continue to bargain with the union while the matter is litigated.

The blocking charge policy does not disparately treat RD and RC petitioners. Rather, the resolution of blocking charges is similar to the resolution of other matters that are routinely determined before an election is conducted.

This brief focuses on the Policy as it affects the dismissal of a decertification petition because of employer support. The Policy affects other violations in different ways, including violations which do not affect a petition's validity ("Type 1 violations"), and violations which might taint a petition but do not involve employer support, e.g. bargaining violations or unlawful discharges that might cause employee disaffection. The Policy also implicates preliminary decisions to block the instant petition. These matters are not at issue here and will not be addressed. Circumstances surrounding proposed settlement agreements are similarly not at issue here and will not be addressed.

II. Because Board's Rules and Regulations, §103.20 codified the Policy, the Board may eliminate the Policy only through APA rulemaking

Petitioner's brief challenges the very existence of a blocking charge policy. Effectively she challenges the Board's Rules and Regulations, §103.20. However, a request for review is not the appropriate forum to challenge the Policy' instead Lemon must raise this challenge through a petition for rulemaking. She may not ask the Board to nullify its published regulation casually through ad hoc decision-making.

§103.20 includes the language:

> If the regional director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional director shall continue to process the petition and conduct the election where appropriate.

In other words, if the party's offer of proof describes evidence that, if proven, would interfere with employee free choice or would be inherently inconsistent with the petition itself, §103.20 "would require that the processing of the petition be held in abeyance absent special circumstances…."

In the promulgating the 2014 election rules,[3] of which §103.20 was a part, the Board wrote, and the dissent agreed, that §103.20 codified the Policy. The Board wrote that it "has decided to codify certain revisions to that [blocking charge] policy

[3] 79 Fed. Reg. 74308 (2014)

here in §103.20."[4] And the dissent wrote, "we … oppose having the blocking charge policy codified in the Board's formal Rules."[5]

The Board promulgated the Policy under authority granted by the Act's §6. §6 authorizes the Board "to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act ("APA")] … such rules and regulations as may be necessary to carry out the provisions of this subchapter." Because §103.20 is a rule made by the Board in accordance with the APA, it may not be rescinded except "in the manner prescribed by" the APA, i.e. through notice and comment. See *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, holding that an agency may not suspend its regulations without subjecting this change to APA notice and comment requirements.[6]

Even before promulgating §103.20, the Board indicated that significant Policy changes are more amenable to rule-making than to review of a regional director's decision. In *Wellington Industries*, the Board declined to reconsider the Policy "in the context of this request for review," noting that "the subject would be better addressed as part of the current rulemaking concerning Board representation case procedures, in which the Board specifically invited comments on whether it should

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[4] *Id.*, 74419. See also, *id.*, 74429 ("In our view, if codification means that any future change in the policy would involve notice and comment rulemaking, so much the better."), and *id.* ("We see no reason to forebear codifying a policy applied so consistently and for such a rational purpose.").

[5] *Id.*, 74456. See also *id.,* 74455 ("In the Final Rule … the blocking charge policy is being retained … and it is being embedded in the Final Rule itself.) and *id.*, 74456 ("codifying the policy is likely to impede or preclude further changes or improvements in this important area").

[6] 716 F.2d 915, 920 (D.C. Cir. 1983).

change its blocking charge policy."[7] The Board noted that "rulemaking presents a more suitable vehicle for revisiting our procedures in this arena in a fully informed and comprehensive manner."[8]

In short, the Board's blocking charge policy cannot be overturned through this request for review. Instead, any changes to the Policy must be made through the rulemaking process.[9] For this reason alone Petitioner's request for review should be denied, because, assuming the truth of the §8(a)(1) allegations, she does not contend that the RD petition's dismissal is unwarranted under current Board policy.

III. The rampant evidence of Mohawk's direct support of the decertification effort requires dismissal of the RD petition under established Board precedent

As a result of the Employer's direct involvement in the decertification effort, the Director correctly found that the showing of interest submitted in support of the RD petition is tainted and rightly dismissed the petition. The Director's decision was

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[7] 359 NLRB 246 (2012),

[8] *Id.*

[9] Even if the blocking charge policy is changed at some future date through rulemaking, the change will have no effect on the dismissal of the instant RD petition, because any change made through rulemaking would apply only prospectively. *Letter from NLRB Chairman Ring to Senators Warren, Sanders and Gillibrand*, https://www.nlrb.gov/sites/default/files/attachments/news-story/node-6695/nlrb_chairman_provides_response_to_senators_regarding_joint_employer_inquiry.pdf, at p. 2, dated June 5, 2018 ("final rules issued through notice-and-comment rulemaking are required by law to apply prospectively only.")

consistent with well-established Board precedent. *SFO Good-Nite Inn, LLC*,[10] *Canter's Fairfax Restaurant, Inc.*[11]

A. Supervisors directly solicited employees

There is ample evidence of Mohawk's direct involvement in the decertification effort by soliciting signatures: The evidence shows that throughout October, 2017, Area Manager Victoria Petty frequently visited employees during working hours, in departments outside her normal jurisdiction, to solicit signatures on the petition. She made multiple attempts to sign employees who refused, instructed employees to report to her office for the purpose of coercing their signatures, and aggressively solicited employees to assist with getting co-workers to sign the petition.

In addition, the evidence shows that Human Resources Manager Megan Hall and Communications Specialist Joe Barragan (a Mohawk agent) witnessed solicitation by anti-union employees, and immediately followed-up to continue the persuasion when employees refused to sign. Barragan strongly encouraged an employee to sign in his office.

The solicitation of decertification petition signatures by supervisors is the quintessential example of direct employer involvement and it is well-established that a RD petition should be dismissed when such direct involvement is found.

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[10] 357 NLRB 79 (2011) (employer assistance or advancement of decertification effort presumptively taints a resulting petition), enfd. 700 F.3d 1 (D.C. Cir. 2012).

[11] 309 NLRB 883, 884 (1992) (explaining that the Regional Director has authority to dismiss an RD petition following an investigation that "reveal[s] that the showing of interest was in fact tainted by the Employer's direct involvement in the decertification effort.")

Hearst Corp.,[12] *V&S Pro Galv, Inc.*,[13] *American Linen Supply Co.*,[14]; *Texaco, Inc.*,[15] *Crafttool Mfg. Co.*[16]

B. Mohawk coerced employees to sign the petition.

In addition to the personal solicitation of signatures by supervisors, the other evidence presented demonstrates that the Employer provided unlawful assistance to the decertification campaign. For example, the evidence shows that Human Resources Manager Megan Hall personally interrogated employees as to whether they would sign the petition and created the impression that Mohawk was monitoring who signed the petition by telling employees "they need just a couple more signatures" on the decertification petition. Also, on multiple occasions, Area Manager Victoria Petty interrogated employees as to whether they would sign the decertification petition, promised benefits to employees if they signed the decertification petition, and threatened employees with unspecified reprisals for not signing the petition.

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[12] 281 NLRB 764, 764 (1986) (where employer seeks to solicit employee repudiation of union as representative, decertification petition is tainted and employer "will be precluded from relying on [it] as a basis for questioning the union's continued majority support"), enfd. mem. 837 F.3d 1088 (5th Cir. 1988).

[13] 323 NLRB 801, 808 (1997) (employer's president tainted petition by soliciting employees to sign), enfd. 168 F.3d 270 (6th Cir. 1999).

[14] 297 NLRB 137, 137-138 (1989) (employer tainted petition by unlawfully soliciting an employee to sign), enfd. 945 F.2d 1428 (8th Cir. 1991).

[15] 264 NLRB 1132, 1132-1133 (1982) (employer's explicit instructions to employees on procedures for decertifying, including dictating language of petition, typing petition, and granting employee afternoon off to distribute it, as well as supervisory involvement in collecting signatures, tainted petition), enfd. 722 F.2d 1226 (5th Cir. 1984).

[16] 229 NLRB 634, 636-638 (1977) (employer's participation in circulation of antiunion petitions tainted its withdrawal of recognition).

This unlawful assistance also requires dismissal of the RD petition. An employer violates Section 8(a)(1) of the Act by "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative." *Wire Products Mfg. Co.*[17] In determining whether an employer's assistance is unlawful, the appropriate inquiry is "whether the Respondent's conduct constitutes more than ministerial aid." *Times Herald.*[18] It is unlawful for an employer agent to interrogate employees about whether they have signed a decertification petition, promise benefits for signing a petition, and threatening employees for not signing a petition. The evidence shows that Mohawk repeatedly engaged in all of these unlawful activities. As a result, the RD petition must be dismissed. *See e.g. NLRB v. Proler International Corporation.*[19]

C. Mohawk encouraged and facilitated employee solicitation.

Here, Mohawk was directly involved in the decertification process. The evidence shows that Area Manager Victoria Petty personally directed an employee to solicit other employees to sign the decertification petition. Moreover, Mohawk allowed petition circulators to collect signatures on work time and transferred Lemon to the 3rd shift to collect additional signatures. This unlawful conduct also requires

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[17] 326 NLRB 625, 640 (1998), enfd.sub nom. mem. *NLRB v R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000)

[18] 253 NLRB 524 (1980).

[19] 635 F.2d 351, 354 (5th Cir. 1981) ("[s]ection 8(a)(1) of the Act makes it unlawful for an employer to instigate and promote a decertification proceeding or induce employees to sign any other form of union repudiating document, particularly where the solicitation is strengthened by the express or implied threats of reprisal or promises of benefit.")

dismissal of the RD petition. See *Consolidated Blenders*, dismissing a decertification petition where "the plant superintendent permitted the decertification petition to be circulated on company time and property…."[20] And see *Highland Yarn Mills*, finding that the employer violated §8(a)(5) by withdrawing recognition from the union on the basis of a petition tainted by the employer's giving anti-union employees free rein of the plant to solicit signatures.[21] Mohawk thus committed multiple unfair labor practices directly tied to the decertification process and has provided more than ministerial aid in advance of the petition efforts. Therefore, the Employer by its conduct has tainted the RD petition, and the Director correctly so found.

IV. The blocking charge policy is firmly rooted in the Act's §§7 and 9.

As stated above, the instant request for review is not the proper forum for a challenging to the Board's blocking charge policy. Nevertheless, the Union will address the Petitioner's arguments regarding the merits of the Policy, and why the Policy is consistent with the Act and should not be overturned.

Lemon claims that the Policy "is not found in and is inconsistent with the Act."[22] In fact, the Policy effectuates the Board's election procedure as set forth in the Act's §9 and protects employees' §7 rights.

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[20] 118 NLRB 545, 547 (1957).

[21] 313 NLRB 193, 208-209 (1993).

[22] Petitioner Tia Lemon's Request for Review ("Lemon's Request") p.5-7.

A. The Policy implements §9(c)(1)(A)'s requirement that an employee must file an RD petition without the benefit of unlawful employer support.

§9(c)(1)(A) provides that decertification election proceedings are triggered by appropriate petitions, specifically by petitions with "substantial" employee support and by petitions filed by specified persons that do not include employers. A petition filed (a) with tainted – rather than substantial – employee support or (b) by an employer – even indirectly through the employer's support of the petition – does not meet §9(c)(1)(A)'s prerequisites for an election, and therefore must be dismissed. §9(c)(1)(A) indicates that an inadequate petition should trigger neither a hearing nor an election.

1. The Policy implements §9(c)(1)(A)'s requirement that a decertification petition be filed with a substantial showing of employee support that excludes support obtained through employer unfair labor practices.

§9(c)(1)(A) requires that decertification petitions be supported by a "a substantial number of employees…." Any "substantial number of employees" must exclude employees whose signatures were obtained unlawfully through employer interference, restraint or coercion in violation of §8(a)(1) or §8(a)(2), or through union restraint or coercion in violation of §8(b)(1(A). See *Dejana Industries*,[23] *Airgas*,[24] and *Coca Cola Bottling Co.*,[25] all dismissing petitions tainted by unlawful employer and/or supervisory support. The Policy, as expressed in CHM §11730.3(a),

[23] 336 NLRB 1202 (2001).

[24] 5-RD-1445, 2008 NLRB Reg. Dir. Dec. LEXIS 232 (Regional Director, October 8, 2008)

[25] 31-RD-1564, 2007 NLRB Reg. Dir. Dec. LEXIS 314 (Regional Director, November 9, 2007).

implements §9(c)(1)(A) by recognizing that such charges may "challenge the circumstances surrounding … the showing of interest" and, "[i]f meritorious … may invalidate … some or all of the showing of interest. As a consequence, the petition may be dismissed."

2. The Policy implements §9(c)(1)(A)'s requirement that employers not file decertification petitions indirectly by unlawfully assisting employees in the petitioning process

§9(c)(1)(A) also provides that decertification petitions may only be filed "by an employee or group of employees or any individual or labor organization…." Employers are not on the list of persons eligible to file decertification petitions.

In fact, a separate provision of §9(c)(1), §9(c)(1)(B), provides that an employer may file a petition – an RM petition – "alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the [§9(a)] representative…." Where a union currently represents the employer's employees, the employer must also show, by objective considerations, that the employer has a reasonable good faith uncertainty as to the union's continuing majority status in the represented unit.[26]

Employers may not circumvent the requirements for filing RM petitions – which requirements are frequently difficult for employers to meet – by unlawfully assisting petitioning employees in soliciting support for a decertification petition – for which "substantial" support generally means only 30% of unit employees. So the Board dismisses petitions filed "indirectly" by employers, i.e. where an employee

[26] *Levitz Furniture Co.*, 333 NLRB 717, 727 (2001).

filed a decertification petition that the employer "fostered." See *Bond Stores*[27] and *Gold Bond*.[28]

The Policy, as expressed in CHM §11730.3(a), implements §9(c)(1)(A) by recognizing that charges alleging unlawful employer support may "challenge the circumstances surrounding the petition" and, "[i]f meritorious … may invalidate the petition…. As a consequence, the petition may be dismissed."

So, in *Bond Stores*, the Board dismissed a decertification petition where the employer's lawyer advised employees about decertifying the union and the employer permitted the employer's typist – on company time – to assist the employees. The Board reasoned that §9(c)(1(A) "indicates that decertification proceedings provide a remedy exclusively for and on behalf of employees, and not employers" and that "the Board cannot, as a matter of policy, permit an employer to do indirectly, through instigating and fostering a decertification petition, that which we would not permit him to do directly."[29] See also *Gold Bond*, dismissing a petition where the employer "indirectly" filed petition through unlawful support of the decertification effort.[30]

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[27] 116 NLRB 1929, 1930 (1956).
[28] 107 NLRB 1059, 1060 (1954).
[29] 116 NLRB at 1930.
[30] 107 NLRB at 1060.

3. In accordance with both §9(c)(1)(A) and its implementing Policy, no hearing should be held, and no election should be conducted because Lemon's petition did not meet §9(c)(1)(A)'s prerequisites; specifically, because of Mohawk's unlawful support, the petition (a) lacked substantial employee support and (b) was indirectly filed by Mohawk.

The Director found that there is a significant likelihood that Lemon's showing of interest and/or petition is invalid. To conduct an election before resolving the validity questions would run counter to §9(c)(1)(A)'s language and intent, that the petitioner satisfy §9(c)(1)(A)'s prerequisites so as to avoid the Board's expenditure of resources on an election that will likely be deemed invalid. Therefore the Director dismissed Lemon's petition in accordance with both §9(c)(1)(A) and the implementing Policy.

§9(c)(1) reads in relevant part:

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees … assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer … [the §9(a)] representative …
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> ***
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. *** If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

The above language establishes a series of prerequisites that must be met before the Board holds a hearing and before the Board conducts an election. The procedure starts "[w]henever a petition shall have been filed…." That petition must have "substantial" employee support. It must be filed by a specified person who is not an employer. Only upon the filing of a petition satisfying these prerequisites does the Board start investigating the petition. Only after that investigation gives the Board "reasonable cause to believe that a" representation question exists is an appropriate hearing required. And only if the hearing record establishes that a representation question exists shall the Board direct an election. In short, unless there is a petition that (a) employees substantially support and (b) an appropriate person has filed, there should be no hearing and no election.

Indeed, the substantial support requirement's purpose is to avoid expending resources on unnecessary elections[31] - and even on unnecessary pre-election investigations and hearings. In *NLRB v. Metro-Truck Body, Inc.*, the court stated, "Were the NLRB unable to require a substantial interest on the part of the target company's employees before commencing an investigation, it would be forced to investigate every representation petition filed by a union, regardless of the actual chances of that petition's success."[32] So, "there is no purpose in permitting the parties to litigate the adequacy of a union showing of substantial interest."[33]

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[31] Outline of Law and Procedure in Representation Cases (2017), chapter 5, p.49, and cases cited therein.

[32] 613 F.2d 746, 749-50 (9th Cir. 1979).

[33] *Id.*

Here, as set forth in the Director's dismissal letter, the Director – after his administrative investigation but without a hearing – determined that Mohawk unlawfully supported "the decertification effort and tainted the petition." Further expenditure of agency resources on an election, which will likely be deemed invalid, will likely waste the agency's resources. As the Director wrote, "further proceedings on the petition are unwarranted." And further, the issue can be revisited after "final disposition" of the unlawful support charges. In short, by dismissing the petition without a hearing or an election, the Director followed §9(c)(1)(A), as well as the Policy that implemented the statute, more specifically CHM §§11730.3(a), 11733.2(a)(1), and 11733.2(b).

4. The Policy prevents employer abuse of §9, thereby protecting employee §7 rights.

The conduct of elections based on petitions filed with unlawful employer support is "a direct abuse of the Board's electoral process itself." *Ron Tirapelli Ford, Inc. v. NLRB.*[34] Such elections would "allow the employer to profit by his own wrongdoing." *Bishop v. NLRB.*[35] And when employer's profit by unlawfully getting rid of the union, employees are deprived of their §7 rights to union representation.

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[34] 987 F.2d 433, 443 (7th Cir. 1993). As discussed below in Section VII.E.2, although *Tirapelli Ford* involved a post-election challenge to an RM petition, its rationale applies with even more strength to pre-election challenges to RD petition.

[35] 502 F.2d 1024, 1029 (5th Cir. 1974). The harm inflicted by a tainted election, even if later overturned, is discussed below in section V.

B. Recent pro-petitioner precedent supports the dismissal of RD petitions determined administratively to be employer-supported

The Policy and the above interpretation of §9(c)(1)(A) gained support from *Truserv Corp.* In *Truserv,* a decision particularly solicitous of decertification petitioners' rights – the Board ordered the reinstatement of a decertification petition after unfair labor practices that could have tainted the petition under *Master Slack*[36] had been settled and remediated – the Board noted that "a decertification petition may not be processed [post-settlement], if … *the Regional Director finds* that the petition was instigated by the employer or that the employees' showing of interest in support of the petition was solicited by the employer…." [emphasis added].[37] The Board cited favorably[38] *Canter's Fairfax Restaurant.*[39]

Canter's involved unfair labor practices settled post-complaint. The Board rejected the union's objection to the settlement that the settlement failed to provide for dismissal of a decertification petition that the employer allegedly unlawfully supported. "Nothing in the instant settlement precludes the Regional Director from

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[36] 271 NLRB 78, 84 (1984). *Master Slack* provides several criteria to determine whether employer unfair labor practices, other than those involving employer support of decertification efforts, cause employee disaffection manifested by signatures on an anti-union petition. See *SFO Good-Nite Inn*, 357 NLRB at 79-80. The criteria are: "(1) the length of time between the unfair labor practices and the … filing of the petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union." *Overnite Transportation Co.*, 333 NLRB 1392, 1393 (2001).

[37] 349 NLRB 227, 227 (2007).

[38] *Id.*, 231.

[39] 309 NLRB 883, 884 (1992).

hereafter conducting an investigation in the representation case of the petition's showing of interest, or from dismissing the petition should that investigation reveal that the showing of interest was in fact tainted by the Employer's direct involvement in the decertification effort."[40]

V. Vote now – litigate later compromises employees' §7 rights and does not advance the §7 rights of anti-union employees

Lemon's proposed procedure – vote now, open now, litigate later – compromises the rights of pro-union employees while providing little of value to anti-union employees. And although Lemon has not proposed voting now and impounding the ballots, this procedure would have most of the same problems as opening the ballots immediately after the election.

A. Conducting an election in an atmosphere tainted by employer violations would itself be coercive because it would entrench the anti-union sentiment induced by the violations

An election conducted in an atmosphere tainted by employer unfair labor practices would reinforce anti-union attitudes formed during the coercive campaign to solicit signatures for the election petition. The election would leave employees further entrenched in their anti-union position by the time they get to vote in a post-remediation election.

In promulgating the 2014 election rules, the Board favorably cited the AFL-CIO's argument that "the tainted election will [likely] compound the effects of the unfair labor practices: an employee who voted against union representation under

[40] *Id.* [footnote omitted].

the influence of the employer's unlawful conduct is unlikely to reconsider the issue and change his or her vote in the rerun election."[41] The Board analogized *NLRB v. Savair Mfg. Co.*, in which the Supreme Court held that a union violated the Act by promising employees that it would waive initiation fees for employees who sign recognition slips before the Board conduct an election. The Court recognized that, "while it is correct that the employee who signs a recognition slip is not legally bound to vote for the union and has not promised to do so in any formal sense, certainly there may be some employees who would feel obliged to carry through on their stated intention to support the union."[42]

In promulgating the 2014 rules, the Board also cited cognitive dissonance theory as suggesting that employees, once unlawfully committed to an anti-union position, would have difficulty abandoning that position. "[W]hen a person is forced to do something she may not support, ultimately, researchers have found that her attitude towards that issue becomes more positive than it otherwise would have been."[43]

So employees, who sign to support a tainted decertification petition, thereby committing themselves to an anti-union stance, are likely to vote against the union in an election held before the employer remediates the unlawful support charges. And, employees who vote against the union in the tainted election are more likely to vote against the union in a post-remediation election.

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[41] 79 Fed. Reg. at 74418.

[42] 414 U.S. 270, 277–78 (1973).

[43] 79 Fed. Reg. at 74418 and *id.*, fn.482.

B. An anti-union outcome of a tainted election would undermine the employees' §7 right to union representation pending final disposition of the charges and the petition.

Again in comments to the 2014 election rules, the Board cited favorably the AFL-CIO's argument that "opening the ballots cast in a tainted election would only compound the effects of the unfair labor practices in the event that a majority votes against representation because it would create the misimpression that the tally reflects the uncoerced choice of the voters."[44] This misimpression would adversely affect the union supporters who want to assert their rights to union representation, which often (although not in this case) would mean that imminently they would want their union to negotiate a successor contract. See *W.A. Krueger Co.*, holding that employees remain represented by their union pending resolution of objections to a decertification election.[45] These employees' ability to assert their rights – their bargaining strength – would be diminished if their fellow employees and the employer believe that the tainted election results are valid and that the union retains only minimal support.

The infringement of these bargaining rights would last for a long time. Months pass while the parties litigate their case before a hearing officer in post-election hearings and then request review of the hearing officer's decision. The delay is even longer when taint allegations are consolidated with unfair labor practice proceedings, which are decided by an administrative law judge and subject to

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[44] 79 Fed. Reg. at 74418-19.

[45] 299 NLRB 914, 916-917 (1990).

appeal to the Board and to an appeals court. No wonder that in commenting on the 2014 election rules, the Board favorably cited the SEIU's argument that inconclusive elections "drill[] into the unit employees' minds the lesson that engaging in the election process is futile."[46]

C. Even if the decertification petitioner ultimately prevails, a vote taken at the time petitioner prevails would better reflect employee desires than a vote taken pre-litigation.

If the decertification petitioner ultimately prevails, the votes cast pre-litigation would be stale. They were cast months if not years before by employees some number of whom have since changed employment or changed their minds. Numerous appellate court decisions, usually when considering the propriety of a *Gissel* bargaining order, find that changed conditions after the passage of time may justify a new election rather than reliance on older evidence of employee union support.[47]

D. An immediate vote still leaves anti-union employees with their rights undetermined for months or years.

A quick election would not determine the rights of those employees who want to get rid of the union. The litigation of allegations of unlawful employee support will continue for months if not years. The anti-union employees will have to wait for the

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[46] 79 Fed. Reg. at 74419.

[47] E.g., *Avecor, Inc. v. NLRB*, 931 F.2d 924, 937 (D.C. Cir. 1991) (in deciding whether to issue Gissel order, Board usually must consider employee turnover); *NLRB v. Arrow Molded Plastics, Inc.*, 653 F.2d 280, 284 (6th Cir. 1981) (four-year passage of time since first election militates in favor of a rerun election and against a bargaining order); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 120 (1st Cir. 1978) (termination of management employee who committed unfair labor practices reduced likelihood that past practices would affect future employee choice).

litigation to take its course before a final ruling that they are free of the union – or not.

VI. The Policy does not discriminate between RD and RC petitions.

A. The Policy applies equally to both RD and RC petitions

Lemon claims that the Policy discriminates against RD petitions while favoring RC petitions.[48] Lemon admits that the Policy facially applies equally to RD and RC petitions.[49] But she claims that the Board's "own statistics … show approximately 30% of decertification petitions are 'blocked,' whereas certification elections are *never* blocked for any reason."[50]

Lemon mistakenly relies on the 2016 *NLRB, Annual Review of Revised R-Case Rules*.[51] But this document refers only to the total number of petitions blocked, without distinguishing between RC and RD petitions.

In fact, the Policy applies equally to employer support of both RD and RC petitions. Assuming that the Policy in this regard disparately affects RD and RC petitions, it likely does so because employers much more frequently support anti-union organizing than pro-union organizing. But see *Dejana Industries*,[52] and

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[48] Lemon's Request, p.7.

[49] Petitioner' Tia Lemon's Request for Review, p.7.

[50] *Id.*, p.10.

[51] https://www.nlrb.gov/sites/default/files/attachments/news-story/node-4680/R-Case%20Annual%20Review.pdf.

[52] 336 NLRB 1202 (2001).

National Gypsum Co.,[53] all dismissing RC petitions because supervisors solicited signatures.

The Policy also applies equally to both unlawful employer support of petitions, including RD petitions, and to unlawful union support of petitions, including RC petitions. See CHM §11730.3(a), which explicitly applies the Policy to "8(b)(1)(A) charge[s] that allege[] a labor organization's showing of interest was obtained through threats or force." Assuming that the Policy in this regard disparately affects unions and employers – and/or RD and RC petitions – it likely does so because the law generally permits unions to support petitions, except for coercive support, e.g. threats and bribes; and generally prohibits employers from supporting petitions, apart from ministerial conduct and §8(c)-protected speech.

These disparities are in no way unfair. Moreover, they are built into the Act's structure. The Act's §8(a)(1) prohibits employer interference, restraint and coercion. But this section's counterpart, §8(b)(1)(A) prohibits only union restraint and coercion. And the Act's §9(c)(1)(A) provides for election petitions filed by unions "alleging that a substantial number of employees … wish to be represented for collective bargaining," implying a union's right to solicit evidence of employee support. But §9(c)(1)(A) provides for no RC or RD petitions to be filed by employers, and §9(c)(1)(B) provides for employer petitions supported by no similar showing of

[53] 215 NLRB 74 (1974).

interest, implying that employer solicitation to support RC or RD petitions is unlawful and that the resulting petitions are invalid.[54]

B. Blocking charges are similar to other matters that must be determined before an election is conducted because the resolution of such matters would determine whether the Board could conduct a valid election

Lemon accuses the Board of implementing a discriminatory policy such that, for RC petitions, all litigation is deferred until after the election while, for RD petitions, blocking charges delay any election until the charges' resolution.[55] In fact the 2014 election rules defer resolution of one category of matters while continuing the Board's practice of resolving many other matters pre-election. Moreover, blocking charges – unlike the matters deferred for post-election resolution by the new rules – would likely invalidate any election conducted before their resolution.

The 2014 election rules "ordinarily" delay for post-election resolution only one new category of issues – "individual eligibility or inclusion issues that do not significantly change the size or character of the unit…."[56] The rules continue the historic practice of resolving pre-election numerous issues, including, "(1) jurisdiction; (2) labor organization status; (3) bars to elections; (4) appropriate unit; (5) multi-facility and multi-employer issues; (6) expanding and contracting unit issues; (7) employee status of a significant portion of the unit; (8) seasonal employees; (9) inclusion of professional employees or guards with other employees

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[54] See above, section IV.A.2.

[55] See, e.g. Lemon's Request, p.7.

[56] "Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015," GC 15-06 (April 6, 2015), p.12.

in a unit; (10) eligibility formulas; and (11) craft and health-care employees"; [57]and eligibility or inclusion issues that would "significantly change the size or character of the unit…."[58]

Blocking charges – which of course may be filed in either RD or RC proceedings – are similar to a number of those issues that must be resolved before an election is conducted, e.g. jurisdiction, labor organization, election bars – and distinguishable from matters newly deferred for post-election resolution – because the resolution of blocking charges may mean that no valid election could be conducted. If the blocking charges are sustained, usually no new election may be conducted, at least until after the violation is remediated, and, in the case of charges that taint a petition, until a new, untainted petition is filed. And especially regarding blocking charges that taint a petition – the type of charges at issue here – the Board should not conduct an election that will result in "the needless expenditure of Government time, efforts, and funds."[59] On the other hand, regarding those matters that should be resolved post-election under the 2014 election rules, there would be no question that an election would have to be conducted; the only question would be whether a relatively small number of ballots should be counted.

VII. Miscellaneous Arguments

Lemon raises a number of additional arguments. Responsive arguments follow.

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[57] *Id.*, p.13-18.

[58] *Id.*, p.12-13.

[59] Outline of Law and Procedure in Representation Cases (2017), chapter 5, p.49, and cases cited thereafter.

A. The Policy does not block Southern Region from appearing on any ballot

Lemon argues that the Policy is blocking Southern Region from appearing on a ballot in violation of the Act's §9(c)(2).[60] §9(c)(2) in relevant part provides that "in no case shall the Board deny a labor organization a place on the ballot" without a §10(c) order. The Policy does not deprive Southern Region of a place on the ballot. Rather, in accordance with the Policy, the Director dismissed the petition, so there will be no ballot with a place that Southern Region could be denied.

The cited provision is inapposite. Its purpose is to assure unions of their right to appear on a ballot without being disqualified except by a §10(c) order. See, *Nathan Warren & Sons*, in which Member Bean, concurring, relied on §9(c)(2) in denying a union's motion that another union be excluded from a ballot because its predecessor was employer-dominated. Because there was no §10(c) order that the second union's predecessor was employer-dominated – the charges alleging employer domination had been settled without a §10(c) order – Member Bean found no reason to exclude the second union.[61]

B. The elimination of delay is a priority that is balanced against other priorities; and that the 2014 election rules addressed.

Lemon argues that the Board, especially in the context of the 2014 election rules, has emphasized the importance of speedy elections – except regarding the

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[60] Lemon's Request, p.6-7.

[61] 119 NLRB 292, 292, fn 13 (1957).

Policy.[62] But in promulgating the election rules, the Board responded to a similar criticism from the dissent: "[N]ot only is delay *not* our only concern, but it is not even a primary concern for many of the amendments; indeed, for certain changes, it is not a consideration at all."[63] In fact, the Board has always balanced competing priorities, of which speedy elections was only one. One competing priority is to protect employees' §7 rights, a priority that is not advanced by conducting elections tainted by unfair labor practices. "It advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference."[64] Moreover, in the 2014 election rules, the Board promulgated a new requirement in §103.20 that parties requesting that charges block an election must make an offer of proof so as to reduce delay caused by frivolous blocking requests. See, *Associated Builders and Contractors of Texas, Inc. v. NLRB*, in which the court rejected a similar attack on the Policy, stating that, in promulgating the 2014 rules, "the Board directly considered the delays caused by blocking charges, and modified current policy in accordance with those considerations."[65]

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[62] Lemon's Request, p.8.

[63] 79 Fed. Reg. at 74429 [emphasis the Board's].

[64] *Id.*

[65] 826 F.3d 215, 228 (5th Cir. 2016).

C. Lemon's assertion that the Policy treats employees like easily-influenced children ignores decades of precedent holding that employer support of decertification efforts interferes with, restrains and/or coerces employees

Petitioner asserts that the blocking charge policy treats employees like easily-influenced children.[66] This criticism cannot be squared with years of NLRB precedent holding that employer support of decertification petitions violates the Act's §8(a)(1), i.e. that it interferes, restrains, and/or coerces employees in the exercise of their §7 rights to refrain from engaging in anti-union activity. And the criticism ignores the power imbalance at the workplace between employees and their employer, an imbalance that is only partially overcome by unionization. See, e.g. *NLRB v. Allen's I.G.A. Foodliner*, noting that there are "few more specific methods of interfering with employees' rights freely to choose or not to choose a bargaining representative than to have each summoned to the office of the employer and there to be asked to sign a prepared statement withdrawing from the Union."[67] Similarly, *Foothills Food* stated that the unlawful employer-assisted solicitation "created a situation where employees would tend to feel peril in refraining from signing the petition."[68]

Here the Director found more than mere employer solicitation. He also found that Mohawk threatened and bribed employees. Threats and promises made by an

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[66] Lemon's Request, p.10-11.

[67] 651 F.2d 438, 440 (6th Cir. 1981), quoting *NLRB v. H. W. Elson Bottling Co.*, 379 F.2d 223, 225 (6th Cir. 1967).

[68] 273 NLRB 63, 64 (1984) (employer principal called employees to office, threatened employees and solicited their signatures on an anti-union petition).

employer that significantly controls an employee's working life are likely to sway that individual.

D. Lemon and her fellow anti-union activist employees are not innocent bystanders to Mohawk's violations.

Lemon is concerned that innocent employees, whom here she compares to children – unlike earlier in the same paragraph when she said that they were not children – will suffer as because they will not get their election as a result of Mohawk's alleged violations.[69] In fact, as argued earlier, employees suffer harm from enduring tainted elections.[70]

E. Appeals court precedent supports the Policy

Lemon cites several appellate decisions critical of the Policy.[71] Yet, appeals courts, including those issuing the decisions upon which Lemon relied, have generally approved of the Policy.

1. The Fifth Circuit supports the Policy

The Fifth Circuit has issued a series of supportive decisions, in *Associated Builders and Contractors of Texas, Inc. v. NLRB*,[72] *Bishop v. NLRB*,[73] and *NLRB v. Big Three Industries, Inc.*[74] In *Associated Builders*, as mentioned earlier, the court explicitly approved of the treatment of the Policy by the 2014 Election Rules.[75] In

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[69] Lemon's Request, p.11.
[70] Above, section V.
[71] Lemon's Request, p.9-10.
[72] 826 F.3d 215, 228 (5th Cir. 2016).
[73] 502 F.2d 1024 (5th Cir. 1974).
[74] 497 F.2d 43, 51-52 (5th Cir. 1974).
[75] 826 F.3d at 228.

Bishop, the court upheld the Board's dismissal of a decertification petition after a complaint issued against the employer. The court described the Policy as "legitimatized by experience"[76] and necessary to prevent employers from profiting by their own wrongdoing.[77] And even where employees have submitted the decertification petition, "the employer's conduct may have so affected employee attitudes as to make a fair election impossible."[78] The court described its earlier decision in *Big Three Industries* as a "common application" of the Policy, in which the court properly upheld the Board's dismissal of a decertification petition pending litigation of a complaint alleging employer bargaining violations.[79]

Petitioner cites an older series of Fifth Circuit cases, *Surratt v. NLRB*,[80] *Templeton v. Dixie Printing Co.*,[81] and *NLRB v. Minute Maid Corp.*[82] But *Bishop* treated *Templeton* and *Surratt* as aberrant applications of the generally beneficial Policy. *Templeton* "was a most unusual case,"[83] "the extremely rare case,"[84] in which "the unfair labor practices were so ancient that even if they had once affected employee attitudes toward the union, those effects were long since dissipated."[85] And in *Surratt*, "the unfair labor practice charges blocking the petition had been

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[76] 502 F.2d at 1032.
[77] *Id.*, 1029.
[78] *Id.*
[79] *Id.*, 1031.
[80] 463 F.2d 378 (5th Cir. 1972).
[81] 444 F.2d 1064 (5th Cir. 1971).
[82] 283 F.2d 705, 710 (5th Cir. 1960).
[83] 502 F.2d at 1030.
[84] *Id.*, 1031.
[85] *Id.*,1030.

found totally without merit by the trial examiner after a full administrative hearing."[86] In *Minute Maid*, the Policy was not even at issue. Rather, the court viewed the dismissal of the decertification petition in accordance with the Policy as justifying the employer's withdrawal of recognition when the employer in good faith doubted the union's continuing majority support. In light of *Bishop's* later and clear support of the Policy, the *Minute Maid* statement is of little value.

2. The Seventh Circuit supports the Policy

The Seventh Circuit, in *Ron Tirapelli Ford, Inc. v. NLRB*,[87] implicitly approved of the Policy. There, the court affirmed the post-election dismissal of an RM petition, based on coercively solicited signatures, where the union had not discovered the evidence of employer support until after the election. But it noted that "Typically, the objections to the unfair labor practices leading to the decertification petition are filed during the pre-election period, and the Board's finding of impermissible employer involvement results in a canceled election."[88] And further, "a petition ought to be held invalid, even in the comparatively rare case, such as this one, where the election occurs before the discovery of the illegality,"[89] i.e. petitions also ought to be held invalid, and therefore dismissed without an election, in the typical case where the union discovers the illegality before any election.

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[86] *Id.*
[87] 987 F.2d 433 (7th Cir. 1993).
[88] *Id.*, 443.
[89] *Id.*

NLRB v. Gebhardt-Vogel Tanning Co.[90] is not to the contrary. There, the court was concerned that the Board dismissed an RD petition based on charges against the employer that the union had withdrawn after the employer belatedly complied with its legal obligations. The dismissal was therefore based on a violation that was established only by administrative investigation and would never be established by a hearing. In the instant case, a hearing is scheduled.

3. Judge Sentelle does not speak for the D.C. Circuit

Lemon cites two opinions by the D.C. Circuit's Judge Sentelle, one dissenting in *T-Mobile USA Inc. v. NLRB*,[91] and one concurring in *Lee Lumber v. NLRB*[92] – i.e. in neither was he able to garner a panel majority. In *Lee Lumber*, he contended that the Policy assumes that "employees are … fools and sheep … [who] have lost all power of free choice based on the acts of their employer." Southern Region addressed this argument above.[93] Nevertheless, Judge Sentelle cannot be saying that that employees' powers of free choice are so strong as to be able to withstand any employer onslaught, not matter how coercive. His strong language may have been a reaction to the Board's holding that an unlawful but short-term bargaining hiatus continued to taint employee sentiment even after the parties restarted negotiations, met in four sessions over several weeks and almost reached agreement on a contract.

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[90] 389 F.2d 71, 75 (7th Cir. 1968).
[91] 717 F. App'x 1, 4 (D.C. Cir. 2018).
[92] 117 F.3d 1454, 1563-64 (D.C. Cir. 1997).
[93] Above, section VII.C.

F. The §8(b)(1)(a) allegations against Southern Region have no impact on the dismissal of the instant RD petition

Petitioner complains that the Policy fails to account for the 8(b)(1)(a) allegations against the Union. This argument is a red herring because there is no comparison between the minor allegations of wrongdoing by local union officials compared to the egregious evidence of widespread unlawful decertification support by Mohawk supervisors.

Region 10 found merit to two allegations against Southern Region. In one instance, a Mohawk employee and local union committee member allegedly stated to a couple of co-workers that those circulating the petition would be fired. The statement by the committee member was not intended as a threat or coercion, but simply reflected his belief at the time that serial violations of two plant rules regarding employees being out of their designated work areas would inevitably result in discipline. He did not make the statement to an RD petition circulator, and the statement cannot reasonably be construed as a threat.

The second allegation stemmed from a 2nd step grievance meeting for a grievance filed by the Union contending that Mohawk gave the Petitioner free rein to travel throughout the plant on work time to collect petition signatures in violation of Mohawk's work rules. During the grievance meeting, a Mohawk employee and local union mill chair made a remark interpreted by management as asking the Company to fire Lemon. The intent of the request (as clearly presented on the written grievance form) was to end the disparate enforcement of the plant rules prohibiting being out of work area. The mill chair never threatened Lemon

and Lemon was not even present at the grievance meeting where the allegedly unlawful statement was made, In fact, the meeting occurred in early November, 2017, after the RD petition had been filed.

To avoid incurring further legal expenses, and to save the Union's resources, Southern Region executed an informal settlement agreement containing a non-admissions clause related to the above-allegations. The Region's merit determination on the allegations against the Union, and the Union's execution of the settlement agreement, have no legal effect on the propriety of the Director's dismissal of the RD petition. The allegations against the Union pale in comparison to the rampant violations by the Company that clearly taint the showing of interest in this case. Therefore this is not an instance where the Union's conduct should result in any mitigation of the remedy for Mohawk's pervasive unlawful support.

In fact, the Union has failed to locate any examples where the dismissal of a decertification petition was overturned due to union violations. Southern Region therefore submits that there is no basis in Board law for the Union's conduct to be used as a basis to alter the Director's dismissal of the RD petition. The Union's and Mohawk's conduct must be viewed independently, and thus if the Company's violations warrant dismissal of the RD petition, that decision stands on its own irrespective of the Union's conduct.

The closest case that deals with withholding relief due to a union's violations is *Laura Modes*,[94] where the Board found that the company violated the Act's

[94] 144 NLRB 1592 (1963).

§8(a)(5) by refusing to recognize the union. The Board, however, declined "to give [the union] the benefit of our normal affirmative bargaining order" because the union "evidenced a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant."[95]

However, the Board has made clear that *Laura Modes* relief is not routine. Indeed, the Board has characterized the withholding of an otherwise appropriate remedial bargaining order as an "extraordinary sanction." *New Fairview Convalescent Home*[96]

Therefore, here, even if *Laura Modes*-type relief were available in this situation (i.e. a remedy less than full dismissal of the RD petition), it would not be appropriate under the present facts because the two allegations against the Union to which the Region has found merit – even assuming they are true – do not rise to the level of extreme conduct that warrants an "extraordinary sanction." There were no threats made directly to Lemon or petition signers; instead the statements were merely isolated off-the-cuff remarks.

By contrast, where *Laura Modes* relief has been granted, the violations by the union were extremely egregious and involved violence. For example, in *Laura Modes*, the employer had unlawfully refused to recognize and bargain with a union that held authorization cards. The Board refused to issue a bargaining order

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[95] *Id.* at 1596.

[96] 206 NLRB 688, 689 (1973), *enfd.* 520 F.2d 1316 (2d Cir. 1975), *cert. denied* 423 U.S. 1053 (1976).

because, immediately before and after the union filed its charges, it engaged in unprovoked and irresponsible physical assaults on the employer.[97] In *Aircraft Mantel & Fireplace Co.*[98] the union obtained signed authorization cards from a majority of the workers and an 8(a)(5) violation was found against the employer for its refusal to extend recognition. However, the Board withheld redress of this 8(a)(5) violation because of numerous acts of violence and misconduct on the picket line, including vandalism to respondent's premises, the placement of nails under vehicles entering said premises, mass picketing, threats, of bodily harm, the paint bombing of the homes of nonstrikers, and the throwing of a cup of coffee by a nonemployee union representative into the face of the employer's owner.

Thus, *Laura Modes relief* is typically ordered in only the most serious cases where a union has engaged in violence. In fact, the Board has held that, "The absence of violence is an acceptable reason for not applying *Laura Modes*." *St. John's Hosp.*[99] Here, there is no allegation of violence by Southern Region. The alleged Union violations, even if presumed true, fall well short of the level of misconduct found in cases where *Laura Modes relief* was ordered. For this reason, the Director's dismissal of the RD petition should be upheld without modification.

CONCLUSION

While Lemon harps upon employees' §7 and §9(c) rights, Mohawk's direct support of the decertification campaign has undermined those rights. Her proposed

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[97] 144 NLRB at 1595-96.

[98] 174 NLRB 737 (1969).

[99] 281 NLRB 1163, 1174-75 (1986).

"remedy" of vote now, open now, litigate later would further undermine these rights. §7 and §9(c) protect the employees' right to be represented by their union, and protect this right from jeopardization through an unlawfully procured election. The Policy is a vehicle through which these rights are protected. The Policy should be maintained and the instant request for review denied.

Respectfully submitted,

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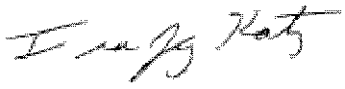

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Dated: June 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, I submitted the foregoing **UNION'S OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DISMISSAL OF PETITION** to the National Labor Relations Board by electronic filing and e-mailed a copy of the same to the Regional Director for NLRB Region 10 and counsel for Mohawk and the Petitioner:

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